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IN THE

Supreme Court of the United States

October Term, 1965

No. 953

EARL HUNTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1965

No. .....

EARL HUNTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Earl Hunter, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming judgments of the United States District Court for the Southern District of California, sentencing petitioner to ten years imprisonment.

Opinions Below.

Trial in the District Court was by court.

The opinion of the court below is appended hereto as Appendix "A", and is also found in the Clerk's Record of the Circuit Court. The opinion of the Court below is as yet not reported. The judgment of the court below is appended hereto as Appendix "B". A copy thereof also appears in the Clerk's Transcript from the Circuit Court.

A Petition for Rehearing was made and denied. The order denying the Petition for Rehearing and the Petition for Rehearing are appended hereto as Appendix "C". It is also found in the Clerk's Transcript of the Circuit Court filed herein.

Grounds on Which the Jurisdiction of This Court Is Invoked.

The date of the judgment sought to be reviewed and the time of its entry is December 17, 1964 (R.C.A. Judgment).

The Petition for Rehearing timely filed was by the Court denied February 4, 1965.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254(1).

Questions Presented for Review.

I.

Damaging Evidence Against the Defendant Was Secured Only Through the Device of Electronic Eavesdropping. Such Information Was Therefore the Product of an Unreasonable Search and Seizure Based Upon an Undeniable Invasion of Appellant's Right to Privacy and Should Have Been Excluded From Evidence. The Federal Courts Should Adopt an Exclusionary Rule to Guard Against the Admissibility of Such Contaminated Evidence.

II.

The Conversation Overheard by Agent Sherman From His Vantage Point Within the Curtilage of Defendant Hunter's Home Was Wrongfully Received in Evidence Inasmuch as the Information Related Was the Product

of an Unreasonable Search and Seizure in Violation of the Federal Constitution, Amendments Four and Five.

III.

The Arraignment of Defendant Hunter Without Counsel Violated the Sixth Amendment to the Federal Constitution Voiding All Further Proceedings.

IV.

21 U.S.C.A. 173, 174 are Unconstitutional in That Their Validity Hinges Upon Proof That the Activity Forbidden Includes Importation and Knowledge of Importation of Narcotic Substances Into the United States and Then Presumes From a Defendant's Mere Possession Both Such Importation and Such Knowledge.

V.

The Statutes Were Inoperative Because There Was Insufficient Proof of the Essential Requirement of Possession.

Constitutional Provisions and Statutes Involved.

Involved are the Fourth, Fifth and Sixth Amendments to the Constitution and 21 U.S.C. 173, 174. They are set forth in Appendix "D".

Statement of the Case.

[All References herein are to the Clerk's Transcript unless otherwise indicated].

A two count indictment charging the defendant Earl Hunter with violating Sections 173 and 174 of 21 U.S.C. (The Narcotics Drug Import and Export Act) was filed on July 31, 1963 in the United States District Court, Southern District of California, Central Division

[3, 4]. On August 12, 1963, the defendant appeared, without counsel, before the Honorable Thurmond Clarke, was arraigned on these charges and stated his true name [5]. On September 9, 1963, with an associate of his counsel present, the defendant entered pleas of not guilty to both charges [6]. The case was assigned to the Court of the Honorable William M. Byrne for trial, which actually commenced on November 5, 1963 [R. T. 4]. Trial by Court was there held and the defendant was found guilty on both counts the very same day [R. T. 92]. The case was then continued for a probation report and sentence until December 2, 1963, at 2:00 p.m. [R. T. 93]. On that date the defendant was present with counsel, judgment was entered, and he received a sentence of ten years on each count, sentences to run concurrently [19]. A notice of appeal was filed [20] and bail was set on appeal at $15,000. The appeal was affirmed on December 17, 1964. The Petition for Rehearing was denied on February 4, 1964.

The appellant has complied with Federal Rules of Criminal Procedure 37, 38 and 39 and all others appropriate to presenting his case before this Court.

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME.

I.

Statement of Facts Pertaining to the Use of Evidence Obtained Via Electronic Eavesdropping.

Prior to visiting the home of the defendant Earl Hunter, the informant Walter Alexander was wired with an electronic device by Federal Agent Lipschutz [R. T. 18]. Agent Lipschutz had Alexander undo his belt buckle and fly buttons, pull out his T-shirt and then taped a microphone to Alexander's side, running the antenna over his shoulder [R. T. 61]. The informant was then ordered to place the tail of his shirt back in his pants, rebuckle his belt and presumably rebutton his pants [R. T. 62]. Agent Pare then accompanied agent Lipschutz in following the informant Alexander, and Agent Sherman who rode with him, to the home of Earl Hunter.

The defendant Hunter beckoned Alexander to follow him into his house, but not agent Sherman [R. T. 20]. A conversation then ensued between Hunter and Alexander [R. T. 21]. This conversation was listened to via the above mechanical eavesdropping device by Agents Lipschutz and Pare in the trailing car [R. T. 63]. Hunter was overheard to say:

> "I told you never to bring anybody to my house. 'It is at 22nd and Vermont in the wash basin in the wash room on the right side.' Put the money in this jacket and bring it back" [R. T. 63].

Agent Lipschutz was permitted to testify to these statements. Subsequently, the two agents, Lipschutz and Pare, followed the informant and Agent Sherman to the corner of 22nd and Vermont where narcotics were

retrieved. [R. T. 64]. These narcotics were the sum and substance of the evidence introduced against the defendant Hunter. After the narcotics discovery, $300 was placed in the jacket which was returned to defendant Hunter by informant Alexander. [R. T. 65-67]. Again Agent Lipschutz was allowed to testify that he overheard Alexander state upon redelivery of the jacket, that, "The reason it took a little long: he wanted to test the stuff and make sure, and he is satisfied." Lipschutz then stated under oath that Hunter remarked, "It will go the same way as any other time, just like it did today." [R. T. 67].

II.

The Damaging Evidence Obtained Through Use of a Mechanical Eavesdropping Device Worn by an Informant and Acquaintance of the Defendant Into His Home and Transmitted to Federal Agents Located Blocks Away Violated the Fourth and Fifth Amendments to the Federal Constitution and Thus Should Have Been Declared Inadmissible. Additionally, This Court Should Not, as a Matter of Policy, Permit the Poisoned Fruit of Such Condemnable Means of Gathering Evidence to Taint a Proceeding in Federal Court.

The Fourth and Fifth Amendments to the United States Constitution have long safeguarded a person's home from invasion by government officials, unless such transgressions were justified by a search warrant supported by probable cause, an effected arrest and an incident search, or consent of the homeowner. *Agnello v. United States*, 269 U.S. 20 (1925); *Taylor v. United States*, 286 U.S. 1 (1932); *Johnson v. United States*, 333 U.S. 10 (1948); *McDonald v. United States*, 335

U.S. 451 (1948); *Jones v. United States,* 357 U.S. 493 (1958); *Chapman v. United States,* 365 U.S. 610 (1960). That a man's home is his castle has never been doubted. Nevertheless, in the case of *Olmstead v. United States,* 277 U.S. 438 (1928), the right to privacy received a Damocletian blow. The United States Supreme Court, in a squeaker decision of 5 to 4, decided that evidence obtained by wiretap was not inadmissible under the Federal Constitution as implemented by the exclusionary rule of *Weeks v. United States,* 232 U.S. 383 (1914). This remains the law today. *On Lee v. United States,* 343 U.S. 747 (1952); *Goldman v. United States,* 316 U.S. 129 (1942). However, there have been signs, as of late, that a movement to overturn *Olmstead* and its successors is rapidly brewing. The position taken by the dissenters in *Olmstead,* namely, Justices Holmes, Brandeis, Butler and Stone, emphasizing the fact of invasion of privacy rather than the means used to invade it, has gained increasing favor. Williams, *One Man's Freedom,* Chs. VII & VIII (1964); See the dissenting opinions in *On Lee* and *Goldman, supra.* While the majority in *Olmstead* interpreted the search and seizure laws to apply only to the seizure of "tangible material effects," 277 U.S. at 466, this is no longer the law. The eyes, *Regelado v. California,* 74 U.S. 497 (1963), *Hurst v. California,* 325 F. 2d 891 (1964), as well as the ears, *Silverman v. United States,* 365 U.S. 505 (1961); *Clinton v. Virginia,* 32 U.S. L.W. 4387 (1964); *Brock v. United States,* 223 F. 2d 681, 685 (5th Cir. 1955), can search. Mr. Justice Burton in his dissent in *On Lee, supra,* pointed up this fact rather clearly:

> "The Fourth Amendment's protection against unreasonable searches and seizures is not limited to the

> seizure of tangible things. It extends to intangibles such as spoken words. In applying the exclusionary rule of *Weeks v. United States*, 232 U.S. 383, we are primarily concerned with where and how the evidence is seized rather than what the evidence is." 343 U.S. at p. 765.

Secondly, the majority in *Olmstead* felt that the right to privacy was secured so long as technical trespasses were prohibited. Justice Brandeis in his dissent marked by evangelical fervor, warned against implanting a horse and buggy approach into the Constitution to secure the need for privacy in 1984. He predicted:

> "Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions." 277 U.S. at 474. See also *Irvine v. California*, 347 U.S. 128, 132 (1954).

Needless to say that day is here. In an era where the breaking of a door stands as primitive when contrasted with the facility of transmitting incorporeal pulsations of electrons along a tautened piece of copper wire or through the air, a declaration that the niceties of property law are non-functional, and scarcely protective of the sacred guarantee of privacy, is compelled. As Mr. Justice Douglas importuned in his dissent in *On Lee*:

> "The nature of the instrument that science or engineering develops is not important. The controlling, the decisive factor, is the invasion of privacy against the command of the Fourth and Fifth Amendments." 343 U.S. at 765.

Again he expostulated in his concurring opinion in *Silverman v. United States,* 365 U.S. 505 (1961), the case holding that evidence obtained by use of a spike mike which penetrated the defendant's heating duct and transmitted his conversations to the police in the next building, violated the Fourth and Fifth Amendments to the Federal Constitution, that:

> "My trouble with *stare decisis* in this field is that it leads us to a matching of cases on irrelevant facts . . . the command of the Fourth Amendment (should not) be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with whether the privacy of the home was invaded." 365 U.S. at 512.

This is the pith of petitioner's position. Clearly, to hold otherwise is to attenuate the Search and Seizure prohibition to a nullity.

It is here urged that the dissenters in *On Lee, supra,* stated the only law consistent with the continued protection of privacy in the modern world. In that case, as in this one, the informant was wired and entered the defendant's place of business with the consent of the owner. Moreover, as here, unbeknownst to the owner, the informant and friend was wearing an electronic device which communicated the entire private conversation to the waiting F.B.I. agent outside the window. The material facts of *On Lee* and this case are identical. In the majority opinion in *On Lee,* Justice Jackson indicated in no uncertain terms that there was a vast difference between the informer testifying (there he did

not) and the testimony of the Agent for the Federal Bureau of Investigation:

> "The normal manner of proof would be to call Chin Poy and have him relate the conversation. We can only speculate on the reasons why Chin Poy was not called. It seems a not unlikely assumption that the very defects of character and blemishes of record which made On Lee trust him with confidence would make a jury distrust his testimony. Chin Poy was close enough to the underworld to serve as bait, near enough the criminal design so that petitioner would embrace him as a confidante, but too close to it for the Government to vouch for him as a witness. Instead the Government called agent Lee. We should think a jury would probably find the testimony of agent Lee to have more probative value than the word of Chin Poy." at page 756.

Thus, there was no question in the court's mind that there was a world of distinction in terms of probative force between the testimony of the informant and the F.B.I. agent. Nevertheless, the majority decided that if the informant could testify so could the agent for he was merely an invisible third party to the conversation. However, since both in *On Lee* and here, the informant was invited into the premises, not the agent, and the informant was using his entrance as a subterfuge for gathering evidence against the defendant for his principal the government, it seems more reasonable to put the informant in the shoes of the Government official rather than *vice versa*. As Mr. Justice Burton explained in his dissent in *On Lee*, if the agent was authorized to be in the house where the informant stood — no problem.

However, if his presence in the house was unauthorized, then the evidence obtained by wiring the informant is the product of an unreasonable search and seizure and therefore inadmissible. Clearly, there was no justification for Agent Lipschutz to have been in the defendant Hunter's house at the point the conversation was overheard. As the Court stated in *Taglavore v. United States,* 291 F. 2d 262, 266 (1961): "The violation of a constitutional right by a subterfuge cannot be justified . . . (otherwise) a mockery could be made of the Fourth Amendment and its guaranties . . ." For cases voiding searches produced by fraudulent entries see *Gould v. United States,* 255 U.S. 298, 305 (1921); *Fraternal Order of Eagles, No. 778 v. United States,* (3rd Cir. 1932) 57 F. 2d 93; *People v. Reeves,* 61 A.C. 259 (1964); *People v. Albert,* 182 Cal. App. 2d 729, 737, 6 Cal. Rptr. 473 (1960).

Finally, the fact that defense counsel made no objection is not material, since under the existing state of the law he would have no reason to and one can hardly expect a defender of the accused to anticipate all changes in the law, in particular the overruling of a principle, however unsound, which dates back nearly forty years. Furthermore, on this precise question, Justice Brandeis stated in his dissent in *Olmstead* that the failure of the defendant to make such an objection does not constitute a waiver because:

> "the objection . . . will be taken by the Court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The Court protects itself." 277 U.S. at 485.

Finally, if this Court is unwilling to take the step of declaring the evidence inadmissible as the tainted fruit

of an unreasonable search and seizure, appellant urges that it declare as a federal policy that such evidence is inadmissible because of the way in which it was gathered, namely, that the method used by Agent Lipschutz violated the privacy of the individual affected, even if there was no "technical trespass." See *McNabb v. United States,* 318 U.S. 332 (1943); *Weeks v. United States,* 232 U.S. 383 (1914); *Rogers v. Richmond,* 365 U.S. 534 (1961).

III.

Facts Relating to the Encroachment on the Curtilage of Defendant Hunter's Home and the Subsequent Acquisition of Information From That Vantage Point.

Agent John Sherman accompanied informant Walter Alexander to the residence of defendant Earl Hunter located at 2616 South Orchard Street in the City of Los Angeles, State of California. At that point, the defendant Hunter was standing outside his house watering his lawn. Sherman and Alexander walked up onto his lawn. Hunter then beckoned his friend Alexander to follow him into the house. He did. Nothing was said to agent Sherman indicating that the defendant consented to his being on the lawn, much less closer to the house [R. T. 19, 47, 48, 76]. Agent Sherman testified to what happened next:

> "Then the defendant and Mr. Alexander entered the residence, and the door was left ajar, and I moved from the lawn close to the door" [R. T. 48].

Agent Sherman then overheard part of the conversation between the informant and defendant Hunter and testified as follows:

> "Mr. Alexander was told by defendant Hunter that he at this time did not wish to meet anyone, and that the package was secreted at the service station at 22nd and Vermont Streets" [R. T. 49].

IV.

The Evidence Obtained by Agent Sherman Was the Product of an Unreasonable Search and Seizure and Thus Inadmissible. Such Evidence Severely Damaged Defendant's Case Entitling Him to a Reversal.

Petitioner contends that Agent Sherman, by locating himself at defendant Hunter's door and listening to the conversation taking place inside Hunter's home, committed an unreasonable search and seizure. Thus, he should not have been permitted to testify to the overheard conversation. In the recent case of *People v. Hurst* (9th Cir. 1964), 325 F. 2d 891, the court held, *inter alia,* that an officer who stands outside a person's bathroom and peers inside, may not testify to what he has seen because such testimony would relate the fruits of an unreasonable search and seizure. The opinion took sustenance from the case of *Brock v. United States* (5th Cir. 1955), 223 F. 2d 681, wherein it was stated:

> "Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking into his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment."

In that case officers stood outside the defendant's bedroom window, listened to and cultivated the defendant's talking in his sleep. The information he disclosed, while sleeping, concerning the location of a still down the road, incriminated and convicted him. The Court reversed on the ground that the officers were not entitled to gather evidence from a position "within the curtilage." Other cases have afforded like protection. *Hobson v. United States* (8th Cir. 1931), 226 F. 2d 890, held that evidence gathered by an officer after his entry into an enclosed backyard amounted to an unreasonable search and seizure, *reversing the case.* cf. *Kroska v. United States* (8th Cir. 1931), 51 F. 2d 330, 333; *Britt v. Superior Court,* 58 Cal. 2d 469, 472, 24 Cal. Rptr. 849, 374 P. 2d 817 (1962); *Regalado v. California,* 374 U.S. 497 (1963). Finally, the Ninth Circuit in the case of *Polk v. United States* (9th Cir. 1961), 291 F. 2d 230, remanded a case to the Federal District Court for further determination where there was evidence susceptible of the construction that the officer had invaded the defendant's privacy by actions in his backyard. Certainly, the agent here has clearly, completely uninvited and with the purpose of gaining evidence to which he was not entitled, entered the defendant's lawn and drawn close to the door to overhear a conversation which ensued between the defendant and his friend, the informant, inside the house. There is no doctrinal distinction between the cases cited above and this one. Consequently, the testimony should have been excluded.

There is little question that the admission of such evidence was highly prejudicial since it consisted of an agent of the Federal Bureau of Investigation relating the defendant's statement as to where heroin could be

found. See *On Lee v. United States,* 343 U.S. 747, 756 (1952) for a judicial declaration that the word of an F.B.I. man is weighty, while the word of an informant is subject to distrust. Furthermore, a reversal is imperative if this evidence "might have contributed to the conviction." *Fahy v. Connecticut,* 375 U.S. 85 (1963). The fact that the defense counsel did not object to this obviously prejudicial evidence is immaterial. *Olmstead v. United States,* (dissent) 277 U.S. 438, 485 (1928); *Smallwood v. Warden Maryland Penitentiary,* 205 F. Supp. 325 (U.S.D.C., D.M.D. 1962). The most such a failure could show under these circumstances is incompetence of counsel. See *People v. Ibarra,* 60 A.C. 435, 34 Cal. Rptr. 863, 386 P. 2d 487 (1963). Although many decisions defend counsed's actions on the grounds of tactics unknown to the appellate court, there is little question but that the conversation testified to by the F.B.I. agent is not susceptible of a reasonable inference that it was beneficial to the defendant Hunter.

V.

In a Federal Criminal Case Each Defendant Is Entitled to Counsel at Every Step of the Proceedings, Including Arraignment. An Arraignment Without Counsel Renders Void Any Subsequent Trial.

The minutes of the Court clearly show that the petitioner Earl Hunter was arraigned on August 12, 1963, without the benefit of counsel. Furthermore, there is nothing in the minutes to indicate that the defendant was advised of his right to counsel and voluntarily waived such right. In fact, appellant's Appendix "E" reveals that counsel had been employed three

weeks prior to the date of arraignment, on July 24, 1963. Not only did his counsel, Mr. Jacke, not appear, but no one appeared to represent the defendant Earl Hunter.

As long ago as 1895 the United States Supreme Court decided that arraignment was a condition precedent to trial in a federal court. *Crain v. United States,* 162 U.S. 625, 643-44 (1895). This Court stated in the course of its opinion:

> "Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities on the subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts, in their abhorrence of crime nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear, affirmatively, from the record that every step necessary to the validity of the sentence has been taken. That cannot be predicated on the record now before us."

In 1914, in the case of *Garland v. Washington,* 232 U.S. 642, this Court was confronted with a case wherein the defendant was convicted of larceny in the State of Washington. He had been arraigned, pleaded not guilty, was tried and convicted. Then a new trial was granted. There was no arraignment or plea on the second in-

formation and no objection voiced as to lack of formal arraignment. Again the defendant was found guilty. The Supreme Court overruled the *Crain* case and announced a new test that a defendant need meet in order to reverse a case for lack of counsel at arraignment. This test required a showing of prejudice. Of course, this was directly contrary to the principle of the *Crain* case, which basically consisted of requiring compliance with arraignment at the penalty of reversal because the task of arraigning the defendant was simple and capable of strict compliance. As we shall see, the principle of the *Crain* case has been reinstated in the law.

A parallel development to the concern over arraignment and other parts of a criminal proceeding in federal courts revolved around right to counsel. The Sixth Amendment to the Federal Constitution requires right to counsel in *all* criminal cases, United States Constitution, Amendment VI. In *Powell v. Alabama*, 287 U.S. 45, 67-68 (1932), the right to effective counsel in a capital case was held a requirement of due process in a state court. Thereafter, a series of decisions was handed down determining the degree to which the 6th Amendment, which has always been applied absolutely in federal cases, *Johnson v. Zerbst*, 304 U.S. 458 (1938), was appropriate to cases tried in state courts by virtue of the spirit of the 6th Amendment being incorporated into the due process clause of the Fourteenth Amendment and thereby transmitted to the states. See *e.g. Moore v. Michigan*, 355 U.S. 155 (1957), *Gibbs v. Burke*, 337 U.S. 773 (1949), *DeMeerleer v. Michigan*, 329 U.S. 663 (1947). These cases were based on *Betts v. Brady*, 316 U.S. 455 (1942), which authorized an *ad hoc* examina-

tion of the record to determine whether there had been a "fair trial." Such factors as the age of the defendant, *Moore v. Michigan, supra,* his intelligence, *Powell v. Alabama, supra,* outside factors of coercion, *Moore v. Dempsey,* 261 U.S. 86 (1923), etc. were evaluated in order to ascertain whether reversal was compelled. This approach came to an abrupt end in the case of *Gideon v. Wainwright,* 372 U.S. 335, 336-37, 342-45 (1963) which overruled *Betts v. Brady, supra.* Immediately preceding and following *Gideon* have come a series of cases guaranteeing right to counsel on appeal, *Douglas v. California,* 372 U.S. 353, 354-58 (1963); throughout the trial, *Hudson v. North Carolina,* 363 U.S. 697, 704 (1960); at the preliminary hearing, *White v. Maryland,* 373 U.S. 59, 59-60 (1963); *and at arraignment, Hamilton v. Alabama,* 368 U.S. 52, 54-55 (1961). It is no secret that even prior to these cases there was a significant trend expanding the concept of right to counsel and moving away from the approach of looking to the facts in order to determine if counsel is needed in favor of strict compliance with so essential a requirement and one so easy to comply with as right to counsel. In *Powell v. Alabama,* 287 U.S. 45, 69 (1932) the Court stated, regarding a defendant's right to counsel:

> "He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

In *Johnson v. Zerbst,* 304 U.S. 458, 467 (1938), probably the classic federal case on the subject, the Court reversed a conviction when it was shown that the

defendant had not had counsel at arraignment, trial or sentence. The Court stated:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."

Consequently, unless the defendant had counsel at arraignment in the instant case the Court had no jurisdiction to proceed further. This is even clearer when we examine *Hamilton v. Alabama, supra.* In that case, the defendant was arraigned without counsel, pleaded not guilty and was convicted and given the death sentence. The absence of counsel at arraignment violated due process. The Alabama Supreme Court had affirmed the conviction because there had been no showing that the defendant was disadvantaged without counsel's presence. The United States Supreme Court reversed. The Court did point out, more as a matter of a description than a requirement, that in Alabama arraignment was a "critical stage in a criminal proceeding" at page 52. However, the court made abundantly clear that under *federal law* a valid arraignment is a constitutional prerequisite to trial. The Court stated:

> "Arraignment has differing consequences in the various jurisdictions. Under federal law an arraignment is a *sine qua non* to the trial itself — the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried. *Crain v. United States,* 162 U.S. 625, 644; Rules 10 and 11, Federal Rules of Criminal Procedure" at p. 54, fn. 4.

Consequently, it is beyond question that the United States Supreme Court has returned to the doctrine of the *Crain* case and overturned the intervening case of *Garland v. Washington, supra,* which the Court didn't even bother to cite. As a matter of fact, there is little question that the federal rule is also absolute in the state court. In *White v. Maryland, supra,* the defendant was not represented by counsel at the preliminary hearing and pleaded guilty. He was represented by counsel at arraignment, entering a plea of not guilty. At trial, the plea of guilty was introduced against him as an admission and no objection was entered. This court reversed, stating:

> "Although petitioner did not object to the introduction of this evidence at the trial . . . the rationale of *Hamilton v. Alabama, supra,* does not rest, as we shall see, on a showing of prejudice" at p. 61.

Thus it is unnecessary that the defendant display any prejudice since the requirement of counsel is absolute.

Of course, a defendant may waive his right to counsel and insist on representing himself. *Johnson v. Zerbst, supra; Adams v. United States ex rel. McCann,* 317 U.S. 269 (1942). However, it must appear affirmatively on the record that the defendant was advised of his right to counel and nevertheless intentionally relinquished this known right. *Johnson v. Zerbst, supra; Gibbs v. Burke, supra; Hawk v. Olson,* 326 U.S. 271 (1945); *Johnson v. United States,* 225 U.S. 405 (1912). Here the record clearly shows no such waiver. In fact, the defendant had retained private counsel and, nevertheless, the court arraigned him without his lawyer being present. Such error was jurisdictional and demands a reversal. *Johnson v. Zerbst, supra.*

VI.

The Statutes Under Which the Defendant Hunter Was Convicted Are Unconstitutional Because There Is No Rational Relationship Between the Fact of Possession of Narcotics and the Presumption That Such Narcotics Are Smuggled Into the Country.

Petitioner is mindful that the Constitutionality of the statutes under which he was convicted, 21 U.S.C.A. 173, 174, has been repeatedly upheld against the attack that a person could possess heroin without knowing it had been imported from abroad. *Yee Hem v. United States,* 268 U.S. 178 (1925); *Gonzales v. United States* (9th Cir. 1947) 162 F. 2d 870. The above cases, and numerous others, have justified such an assumption, as a rule of evidence, on the ground that since the manufacture of heroin is illegal in all parts of the United States and legal in some foreign countries that presumably the heroin came from those foreign countries. This presumption has prevailed despite cases in which the evidence showed that synthetic morphine is produced in the United States and that heroin is derived from morphine by a simple process; *Bradford v. United States* (9th Cir. 1959), 271 F. 2d 58, 60; moreover, codein, an opiate derivative, can be manufactured legally in the United States and turned into heroin, *ibid.* Nevertheless, knowing that the statute cannot apply to domestic grown opium, *Marks v. United States,* 196 Fed. 476 (1912); *cf. Caudillo v. United States* (9th Cir. 1958), 253 F. 2d 513, cer. den. 357 U.S. 931, and that

this court has never been hesitant to reconsider past decisions which cannot stand the test of time, see *e.g. Mapp v. Ohio,* 367 U.S. 643 (1961), appellant seeks reconsideration of this issue. Quite frankly, it is doubtful that a defendant in a narcotics case ever concerns himself with the ultimate source of the narcotics, that is, whether they emanated from within the nation or without. Furthermore, it seems just as conjectural to assume that the defendant knew that the particular heroin was brought from abroad because large quantities are rumored to be imported as it is to assume that a defendant knows that a particular firearm he possessed had been transported in interstate commerce because a substantial number of guns are shipped in interstate commerce. Yet the latter presumption has been held unconstitutional. *Tot v. United States,* 319 U.S. 463 (1943). In neither case does the defendant really know anything. The law just assumes his knowledge for him. The Court is aware of the stringent state laws governing narcotic misbehavior, especially in California. They have not been shown to be so inefficacious that the Federal Government must legislate in the state domain. The vicious fiction that a defendant is presumed to know that heroin was imported and, if not, to undertake the impossible task of disproving the presumption should be eradicated from the law. The Statutes in question should be declared unconstitutional.

VII.

Statement of Facts Relating to the Insufficiency of the Government's Proof of Possession of Narcotics.

Walter Alexander, a Government informant, with a background of narcotics activity, testified that in the presence of Government agents Sherman and Lipschutz he placed a telephone call to Earl Hunter, a friend of his, reaching him at home [R. T. 15]. This telephone call occurred at approximately 5:00 in the evening on May 14, 1963 [R. T. 15]. Alexander related that he "told him that the fellow that I had been talking to him about didn't want to give up the money unless he had the merchandise first," and that Hunter replied, "O.K. Come on over" [R. T. 17]. This conversation was overheard by Agent Lipschutz via an attachment or twin phone [R. T. 59-61]. Then Agent Sherman searched the informant, agent Lipschutz armed him with an electronic recording device under his clothing and Alexander drove agent Sherman to the home of defendant Hunter [R. T. 18-19]. They were followed by agents Lipschutz and Pare in another vehicle [R. T. 62]. Upon arriving at Hunter's residence, located at 2616 Orchard Street in the City of Los Angeles, both agent Sherman and the informant got out of the car and walked onto Hunter's front lawn [R. T. 19]. Hunter was watering the lawn at that time [R. T. 76]. He cut off the hose and beckoned the informant, Alexander, into the house [R. T. 20]. Agent Sherman remained outside — moving close to the door to hear any ensuing conversation between Alexander and Hunter [R. T. 48]. The conversation was in a normal tone of voice [R. T. 21]. The informant testified that Hunter told him he didn't want to meet anyone

and that the package was over at a service station at 22nd and Vermont [R. T. 21]. According to the informant, Alexander, Hunter handed him a gray leather jacket and told him to put the money inside it and return the jacket to him [R. T. 22]. Then agent Sherman and the informant left the scene and travelled to the corner of 22nd and Vermont [R. T. 22]. At that location they went into the men's room and agent Sherman reached under the right side of the face bowl and pulled out the package which contained two balloons of heroin [R. T. 23, 11, 12]. They then reentered the automobile and returned to a spot where agents Lipschutz and Pare were waiting [R. T. 26]. Agent Sherman then placed $300 into the jacket pocket and the informant went back alone to Hunter's house [R. T. 26-27]. Alexander was still wearing his electronic device at this time [R. T. 27]. Alexander testified that he pulled up in front and honked the horn; that Hunter came out of the house; and that he (Alexander) handed Hunter the jacket telling him that fellow was satisfied with the stuff, and if he kept it that way he would continue to do business with him [R. T. 27].

The facts also disclosed that the informant Alexander had, previous to the episode of May 14th, sought repeatedly to obtain narcotics and asked the defendant Hunter to help him do so [R. T. 37-38, 73]. On each occasion the defendant Hunter turned thumbs down on his request, even though he was at that time a good friend [R. T. 37-38, 73]. According to Hunter, on the previous evening before the transaction constituting the gravamen of the charges here, Hunter met Alexander on Fifth Street at the bar of the Morris Hotel [R. T. 74]. Alexander told Hunter that he was desperate, had

family problems and financial difficulties and needed to procure narcotics to get on his feet [R. T. 74]. Hunter promised to check and see if narcotics could be obtained [R. T. 74]. Hunter was able to locate a seller of narcotics via telephone and arranged for them to be made accessible to the informant [R. T. 75-76]. Hunter testified that he made no money on the deal [R. T. 77]. The informant took the position that he performed his part in the transaction only as a public spirited citizen [R. T. 35].

VIII.

Assuming the Constitutionality of the Statute, It Becomes Operative Only Upon Proof That the Defendant Possessed Narcotics. The Fact That the Defendant Facilitated a Sale of Narcotics Is Not Sufficient to Demonstrate That He Possessed Them.

The charges against the defendant do not apply unless his possession of narcotics is first proved. 21 U.S.C.A. 174; *Bradford v. United States* (9th Cir. 1959), 271 F. 2d 58; *Velasquez v. United States* (10th Cir. 1957), 244 F. 2d 416; *Toy v. United States* , 266 Fed. 326 (1920), cert. den. 254 U.S. 1939. The Federal Courts have very carefully limited the concept of "possession" so as not to stretch it beyond the common meaning attributed to it. See *United States v. Jones* (2nd Cir. 1962), 308 F. 2d 26; *Arellanes v. United States* (9th Cir. 1962), 302 F. 2d 603; *Hernandez v. United States* (9th Cir. 1962), 300 F. 2d 114; *United States v. Mills* (3rd Cir. 1961), 293 F. 2d 609; *Adams v. United States* (5th Cir. 1955), 220 F. 2d 297; *United States v. Contrades*, 196 F. Supp. 803 (1961); *United States v. Santore* (2nd Cir. 1960) 290 F. 2d 51. As the Court

enunciated in *United States v. Wainer* (7th Cir. 1948), 170 F. 2d 603, 606: "To 'possess' means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature."

Possession must be in the defendant not in someone else with the defendant's knowledge or even with his permission, *United States v. Lanary* (7th Cir. 1958), 257 F. 2d 425; *Morei v. United States* (6th Cir. 1942), 127 F. 2d 827. Moreover, the defendant may even own the goods so long as he does not presently possess them. *United States v. Lanary, supra.* Although the defendant demonstrates a willingness to participate in the narcotics trade, even to the point of telling a party where he may find narcotics located, this is not present possession. *United States v. Jones, supra*; *Williams v. United States* (9th Cir. 1961), 290 F. 2d 451; *Morei v. United States, supra.*

In *United States v. Jones, supra,* the defendant, as in this case, was found guilty of violating section 174 of Title 21 of the United States Code (The Narcotics Drug Import and Export Act). The facts revealed that the defendant advised a Government agent that he would obtain narcotics for the agent through his "connection." The defendant conversed with the "connection," introduced the two and the "connection" delivered narcotics to the buyer upon payment of $150. The Court, although recognizing the doctrines of "constructive possession" and "aiding and abetting," held that the proof of possession was insufficient inasmuch as the defendant merely arranged the sale of heroin. The Court stated:

> "As far as the record discloses, defendant did nothing except to introduce a willing buyer to a willing seller and to serve as a go-between until

> such time as the willing seller and willing buyer were satisfied to do business with each other." at page 31.

In *Williams v. United States, supra,* the defendant's conviction was reversed for insufficient proof of possession even though the buyer was told the defendant would leave narcotics in a refuse can next to the cafe where the defendant worked, and when the defendant accompanied the buyer to the trash can the narcotics were located therein. In *Morei v. United States, supra,* the defendant was approached by the Government informant to buy narcotics and directed him to another person where the sale was consummated. The case was reversed for failure to prove possession.

It is the possession argument which the Circuit Court apparently regarded as most serious in view of its decision. Again, since the issue was not raised at trial, we can only speculate as to whether the Court believed *Hunter's* testimony. It could be that — even believing it — Hunter was found guilty because the Court was not apprised of the *Williams* case at that time. The court concedes this to be the case but relies on the traditional rule that it must assume that the trial court found those facts fairly inferred from the evidence which are most favorable to the Government. It thus concludes that *Williams v. United States* (9th Cir. 1961), 290 F. 2d 451 is unlike *Hunter* because "There, the evidence pointed strongly to the conclusion that someone other than the defendant placed the narcotics where the informer found it."

In the present case the evidence shows that the informant Alexander, after repeated efforts to convince the defendant Hunter to secure narcotics for him,

succeeded in having Hunter arrange for another person to sell them to the informant. Clearly, the defendant Hunter had no physical custody of the contraband. While physical possession is not a requirement, the total arrangement shows nothing more than that defendant Hunter contacted a person who was a willing seller of narcotics and that person placed the narcotics in the restroom where they were brought to the attention of a willing buyer. The fact that the defendant was a "go-between" or facilitated the sale by making it possible, does not establish a case of possession. See *Morei v. United States, supra,* 830-32 (quoted with approval by the 9th Circuit in *United States v. Robinson* (9th Cir. 1959), 262 F. 2d 645, 649-51. Furthermore, the acceptance of money by the defendant Hunter does not implicate him anymore than to show that he agreed to deliver the money to the seller. To find "possession" on a fact so tenuous is to ignore the principles laid down by the Courts on this subject.

It is respectfully urged that *even if* the trial court is presumed to have ignored Hunter's evidence, it was left with the following situation:

Narcotics agent Sherman and informant, Alexander, departed from *Hunter's* resident in a car, *leaving Hunter at home,* and went directly to the gas station where the heroin package was found in the washroom. Alexander returned to *Hunter's residence,* followed by Federal agents, honked his horn and Hunter came out of his house. The evidence is not susceptible of a reasonable inference that Hunter placed the narcotics where they were found. To distinguish *Williams* in this manner is to gravely attenuate the proof of "possession" incumbent upon the Government and permit an unauthorized

intrusion of Federal laws upon State legislation. Appellant wishes to call the Court's attention to a case, which like the present one, hinged upon proof of "possession" as required by the same statute governing us here. In *Hernandez v. United States* (9th Cir. 1962), 300 F. 2d 114, the Ninth Circuit Court reversed a federal narcotics conviction because the proof of possession fell short of the necessary standard. The Court held:

> "We are convinced on the other hand, that an interpretation of the term 'possession' in Section 174, which would include the possession of a third person, not on trial, with whom the defendant has entered into a common scheme or plan or whom he has aided and abetted, but whose possession of narcotics drugs he has neither shared or controlled, would be unconstitutional within the language, the structure and the purposes of the statute." At p. 119.

Petitioner submits that the essential ingredients of a case of possession are notably missing. Without them no violation has occurred and the convictions should be reversed.

Conclusion.

The Petition for Writ of Certiorari, we respectfully pray, should be granted and the judgment reversed.

RUSSELL E. PARSONS and
LUKE MCKISSACK,
Attorneys for Petitioner, Earl Hunter.

APPENDIX "A".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Earl Hunter, Appellant, vs. United States of America, Appellee. No. 19,223.

[December 17, 1964]

Appeal from the United States District Court for the Southern District of California Central Division.

Before: Barnes, Duniway and Ely, Circuit Judges

Duniway, Circuit Judge:

Hunter appeals from his conviction on two counts of an indictment charging violations of 21 U.S.C. §174. We are affirming.

1. Hunter claims that he was arraigned without counsel, and that this violates the Sixth Amendment to the Constitution. On August 12, 1963 he appeared without counsel and stated that his true name was as set forth in the indictment. No plea was taken, the matter being continued "for plea" to August 19. He then appeared with counsel and pled not guilty. At the first appearance, he was not "arraigned," as he was not called upon to plead. (Rule 10, F.R.Crim. Proc.) When he was arraigned, and did plead, he was represented. *Hamilton v. Alabama*, 1961, 368 U.S. 52, and *White v. Maryland*, 1963, 373 U.S. 59, are not in point.

2. Part of the evidence against Hunter was given by a federal agent, who heard, via a radio, a conversation between Hunter and an informer who was wired for

sound. This did not violate his constitutional rights. *On Lee v. United States,* 1952, 343 U.S. 747; *Carbo v. United States,* 9 Cir., 1963, 314 F.2d 718, 738; *Todisco v. United States,* 9 Cir., 1962, 298 F.2d 208, 209-210; *cf. Lopez v. United States,* 1963, 373 U.S. 427.

3. An agent of the government standing outside Hunter's door, which was ajar, also heard the conversation. It is now claimed that the agent was trespassing on Hunter's property, and that his listening was therefore a violation of Hunter's rights under the Fourth Amendment. No objection was made in the trial court (Rule 51, F.R.Crim.Proc.) Moreover, the record does not sustain the claim that the agent was a trespasser. For all that appears, the agent may have been standing on a public sidewalk. We do not pass upon the question, as the record does not present it.

4. Hunter attacks the validity of the "presumption" established by 21 U.S.C. §174. The drug was heroin. As applied to heroin, the "presumption" is valid. *Yee Hem v. United States,* 1925, 268 U.S. 178; *White v. United States,* 9 Cir., 1963, 315 F.2d 113; *Bradford v. United States,* 9 Cir., 1959, 271 F.2d 58; *cf. Caudillo v. United States,* 9 Cir., 1958, 253 F.2d 513.

5. Hunter asserts that the evidence does not show that he had possession of the narcotic. He agreed to sell the narcotic to the informer. He told the informer that the narcotic was under the washbasin in a certain service station. At the same time, he handed a leather jacket to the informer and told him that after obtaining the narcotic he was to put the money in the pocket of the jacket and return it. The narcotic was where Hunter said it would be. The jacket, with the money in it, was

returned to Hunter. From these facts, the court could conclude that Hunter had possession. *White v. United States, supra; Rodella v. United States,* 9 Cir., 1960, 286 F.2d 306, 310. *White* is squarely in point. *Williams v. United States,* 9 Cir., 1961, 290 F.2d 451, on which Hunter relies, is different. There, the evidence pointed strongly to the conclusion that someone other than the defendant placed the narcotic where the informer found it. Hunter's testimony, if believed, might have brought the case within the decision in *Williams*. The court did not have to believe it.

6. The record does not sustain the claim that Hunter did not have the effective assistance of counsel. He did have it.

Affirmed.

APPENDIX "B".

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Earl Hunter, Appellant, vs. United States of America, Appellee. No. 19,223.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this Cause be, and hereby are affirmed.

Filed and entered December 17, 1964.

APPENDIX "C".

Order Denying Petition for Rehearing.

Dated: February 4, 1965.

The Petition for a Rehearing heretofore filed in case No. 19,223, *Hunter vs. United States,* was this day denied.

In the United States Court of Appeals for the Ninth Circuit.

Earl Hunter, Appellant, vs. United States of America, Appellee. No. 19223.

Petition for Rehearing.

To the Honorable Judges of the Above Entitled Court:

COMES NOW the Appellant, Earl Hunter, and respectfully petitions the above entitled Court for a rehearing as to him and urges that:

1. THE APPELLANT HUNTER WAS ARRAIGNED WITHOUT COUNSEL ON AUGUST 12, 1963. THE CLERKS RECORD SHOWS HE WAS "ARRAIGNED." THE FACT THAT HIS PLEA WAS ENTERED ON A SUBSEQUENT DATE WHEN COUNSEL WAS PRESENT, THUS *COMPLETING* THE ARRAIGNMENT, DOES NOT MEAN THAT HIS COUNSEL WAS PRESENT THROUGHOUT THE ARRAIGNMENT PROCESS, AND THE RECORD SHOWS TO THE CONTRARY. THE

SIXTH AMENDMENT GUARANTEES COUNSEL AT ALL STAGES OF ARRAIGNMENT, NOT JUST PART OF IT.

With all due deference to this Court, *no* case has ever held that counsel need only be present at part of the arraignment process and absent during the remaining portion. Here the record shows that Hunter was "arraigned" without counsel (5). Although his plea was entered at a later date when counsel was present, this only proves that part of the arraignment proceedings were conducted in the presence of counsel and part were not. It must affirmatively appear in the record that counsel was present throughout arraignment, *Johnson v. Zerbst,* 304 U.S. 458 (1938) and the question of the prejudicial effect of such neglect is not the subject of inquiry. *Hamilton v. Alabama,* 368 U.S. 52 (1961); *White v. Maryland,* 373 U.S. 59 (1963).

2. AGENT LIPSCHUTZ'S ELECTRONIC EAVESDROPPING VIOLATED THE RIGHT OF PRIVACY EMBODIED IN THE FOURTH AND FIFTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

3. AGENT SHERMAN COMMITTED AN UNREASONABLE SEARCH AND SEIZURE BY STANDING NEXT TO THE APPELLANT HUNTER'S DOOR AND LISTENING TO HIS PRIVATE CONVERSATION. IF THE QUESTION OF INVASION OF PRIVACY IS IN DOUBT FROM THE FACTS, IT SHOULD BE REMANDED FOR RECONSIDERATION UNDER THE *POLK* CASE.

The Court has held that the defendant had the effective assistance of counsel; nevertheless, in spite of what appears to be an illegal search and seizure, rather than remand the case under *Polk v. United States* (9th Cir. 1961) 291 F. 2d 230, a decision on all fours with the present one, the court chooses to rely upon counsel's incomplete development of facts at trial as a bar to evaluating this most crucial issue.

4. THE PRESUMPTION OF KNOWING IMPORTATION OF HEROIN INTO THE COUNTRY CONTAINED IN U.S.C. Sec. 174 IS UNCONSTITUTIONAL.

5. THE PRESUMPTION OF KNOWING IMPORTATION COMES INTO PLAY ONLY AFTER POSSESSION IS SHOWN. UNDER THE *WILLIAMS* CASE POSSESSION WAS NOT SHOWN. THE FACT THAT THE TRIAL COURT MAY HAVE CHOSEN TO DISBELIEVE HUNTER WHEN HE STATED HE DIDN'T PUT THE NARCOTICS IN THE RESTROOM DOESN'T CHANGE THE PREVIOUS STATE OF THE EVIDENCE TO PROVE THAT HUNTER PUT THE NARCOTICS IN THE RESTROOM. THE EVIDENCE AT MOST PROVES ONLY THAT HUNTER ARRANGED FOR A NARCOTICS SALE AT THAT LOCATION AND THE EVIDENCE IS OVERWHELMING THAT HUNTER HIMSELF DIDN'T PLACE THE NARCOTICS IN THE WASHROOM.

It is the possession argument which the Circuit Court apparently regarded as most serious in view of its decision. Again, since the issue was not raised at trial, we can only speculate as to whether the Court believed *Hunter's* testimony. It could be that — even believing it — Hunter was found guilty because the Court was not apprised of the *Williams* case at that time. The court concedes this to be the case but relies on the traditional rule that it must assume that the trial court found those facts fairly inferred from the evidence which are most favorable to the Government. It thus concludes that *Williams v. United States* (9th Cir. 1961) 290 F. 2d 451 is unlike *Hunter* because "There, the evidence pointed strongly to the conclusion that someone other than the defendant placed the narcotics where the informer found it."

It is respectfully urged that *even if* the trial court is presumed to have ignored Hunter's evidence, it was left with the following situation:

Narcotics agent Sherman and informant, Alexander, departed from *Hunter's* residence in a car, *leaving Hunter at home,* and went directly to the gas station where the heroin package was found in the washroom. Alexander returned to *Hunter's residence,* followed by Federal agents, honked his horn and Hunter came out of his house. The evidence is not susceptible of a reasonable inference that Hunter placed the narcotics where they were found. To distinguish *Williams* in this manner is to gravely attenuate the proof of "possession" incumbent

upon the Government and permit an unauthorized intrusion of Federal laws upon State legislation. Appellant wishes to call the Court's attention to a case, which like the present one, hinged upon proof of "possession" as required by the same statute governing us here. In *Hernandez v. United States* (9th Cir. 1962), 300 F. 2d 114, the Ninth Circuit Court reversed a federal narcotics conviction because the proof of possession fell short of the necessary standard. The Court held:

> "We are convinced on the other hand, that an interpretation of the term 'possession' in Section 174, which would include the possession of a third person, not on trial, with whom the defendant has entered into a common scheme or plan or whom he has aided and abetted, but whose possession of narcotics drugs he has neither shared or controlled, would be unconstitutional within the language, the structure and the purposes of the statute." At p. 119.

6. APPELLANT HUNTER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT THE FACTS UNDERLYING WHAT APPEARS TO BE AN OBVIOUS UNREASONABLE SEARCH AND SEIZURE, AS DEVELOPED IN ARGUMENT THREE, SUPRA, WERE NOT DEVELOPED SO THAT THE ISSUE COULD BE EVALUATED. FURTHERMORE, THE ISSUE OF "POSSESSION" WAS NOT EVEN ARGUED TO THE COURT.

CONCLUSION

Appellant respectfully asks the Court to reconsider its prior decision since this is a case of first impression in some respects and the importance of the rulings calls for a rehearing.

We further urge that the rehearing should be granted and the matter heard by the Court En Banc.

Respectfully submitted,

Luke McKissack,
Attorney for Defendant-
Appellant, Earl Hunter

CERTIFICATE OF COUNSEL

State of California, County of Los Angeles—ss.

I, LUKE McKISSACK, attorney for the Appellant EARL HUNTER, do hereby certify that in my opinion the Petition for Rehearing is well founded and that it is not interposed for delay.

DATED at Los Angeles, California, this 7th day of January, 1965.

Luke McKissack

APPENDIX "D".

Constitutional Provisions and Statutes Involved.

Fourth Amendment, United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any persons be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

21 U.S.C. 173

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily

forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

21 U.S.C. 174

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under it control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

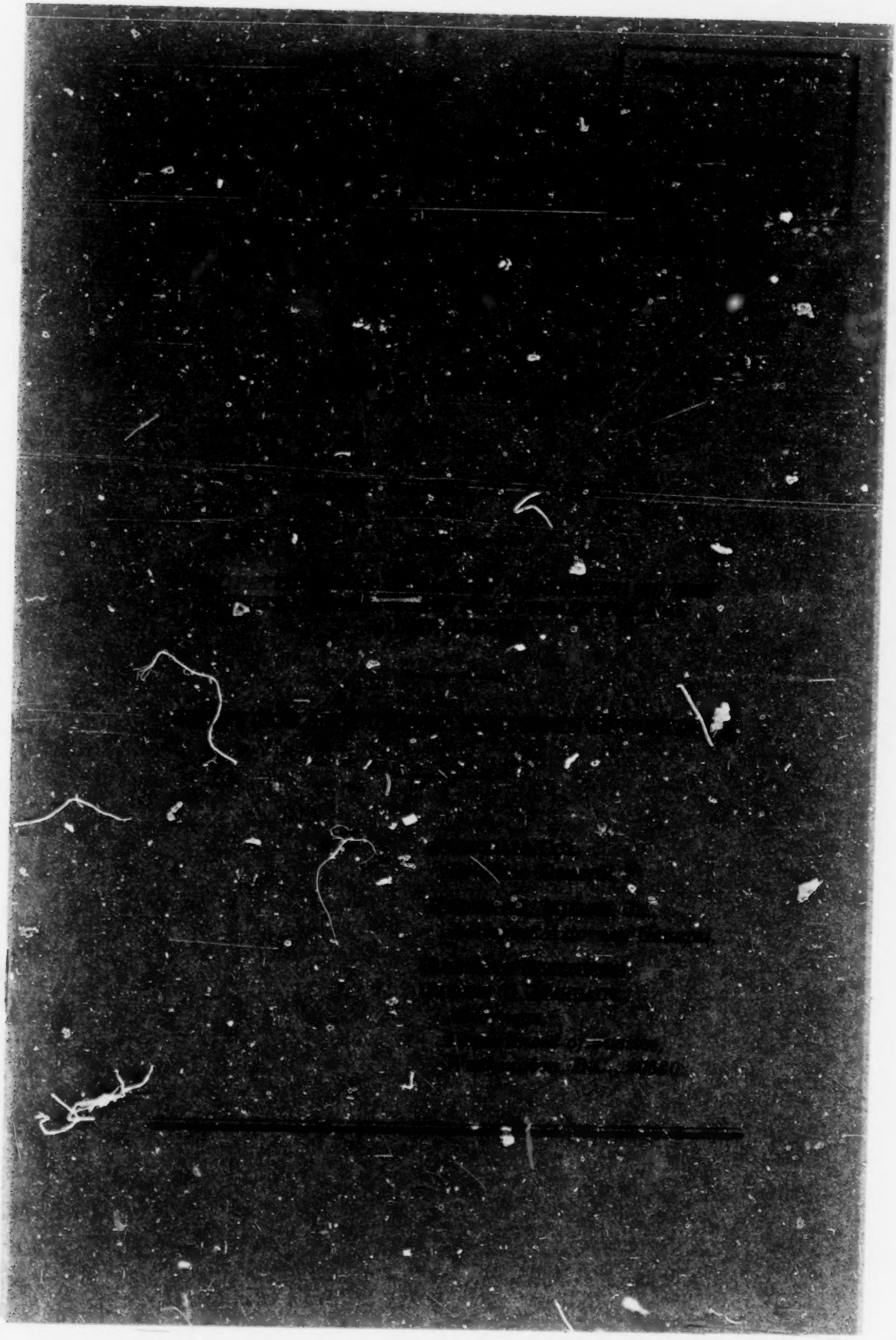
APPENDIX "E".

Declaration of Earl Hunter.

I, the undersigned, employed attorney H. Clay Jacke to represent me in my trial in Federal Court which resulted in a finding of guilty on two counts of violating the federal narcotics laws. He agreed to accept the case upon payment of a $200 retainer which was paid on July 24, 1963. He was my counsel at the time of arraignment on August 12, 1963 but did not appear, resulting in my being arraigned without counsel. I believed that by retaining Mr. Jacke I was insured of his representation at all stages of the proceeding. I did not know prior to arraignment that Mr. Jacke was not going to appear in court in my behalf. Enclosed is the check with which I paid Mr. Jacke's retainer.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Earl Hunter, Petitioner



In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 953

EARL HUNTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. I, 29-30; Pet. App. 1-3) is reported at 339 F. 2d 425.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1964 (R. I, 31; Pet. App. 4). A petition for rehearing (Pet. App. 5-11) was denied on February 4, 1965 (R. I, 32). The petition for a writ of certiorari was filed on March 4, 1965. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a narcotics agent who, by means of a listening device, overheard conversations between petitioner and a government informant wearing a concealed electronic transmitter was properly permitted to testify as to these conversations.

2. Whether another agent, who overheard one of these conversations while standing close to the open front door of petitioner's residence, was properly permitted to testify as to this conversation.

3. Whether petitioner was represented by counsel at his arraignment.

4. Whether this Court should reconsider its rulings upholding the validity of the statutory presumption of illegal importation arising from possession of narcotics.

5. Whether the evidence was sufficient to show petitioner's possession of narcotics.

STATEMENT

Petitioner was charged in a two-count indictment in the United States District Court for the Southern District of California with the concealment and sale of heroin in violation of 21 U.S.C. 174 (R. I, 3, 4). In a jury-waived trial, the court found petitioner guilty on both counts (R. I, 16; R. II, 92). Petitioner was given concurrent sentences of imprisonment for ten years on each count (R. I, 19; R. II, 112). On appeal

the conviction was affirmed (R. I, 20, 31; Pet. App. 4).

Government evidence adduced at the trial showed that on May 14, 1963, at about 5:00 p.m., an informant named Alexander called petitioner at his residence from a Los Angeles telephone booth. Agent Lipshutz was with Alexander and listened to the conversation (R. II, 14-16, 46(a), 59-60). Alexander told petitioner that the person about whom he had spoken "did not want to give up the money unless he had the merchandise first." Petitioner said, "O.K. Come on over" (R. II, 17, 61). Agents Lipshutz and Sherman then searched Alexander, attached an electronic transmitting device to his body (R. II, 18, 46(a), 61-62), and drove with him to petitioner's residence (R. II, 19, 46(a)-47). After they had parked the car, petitioner, who was standing on the lawn, asked Alexander to come into the house with him, and Alexander did so. Meanwhile Sherman approached the door, which had been left ajar, and overheard the ensuing conversation between petitioner and Alexander (R. II, 19-21, 47-48). Petitioner said that he did not want to meet anyone and warned Alexander never to bring anyone to his house. Petitioner informed Alexander that the package was on the right side of a wash basin in the men's room of a service station at 22nd and Vermont; he also gave Alexander a leather jacket and told him to put the money in the jacket and return it (R. II, 21-22, 49-50, 63). This conversation between petitioner and Alexander was also overheard by agent Lipshutz, who was listening to an electronic receiving device while seated in the automobile (R. II, 62-63). At petitioner's trial

Alexander and the two agents testified to the conversation.

Alexander and agent Sherman then drove to the service station men's room at 22nd and Vermont. Under the wash basin Sherman found yellow and white balloons, each containing heroin, wrapped in face towels (R. II, 10-12, 23-25, 50-52). Alexander and Sherman drove to a prearranged location where they met agent Lipshutz. Sherman conducted a field test for heroin which proved positive and then put $300 into a pocket of the jacket petitioner had given to Alexander, who was again searched (R. II, 26, 54-56, 65).

Alexander, who was still wearing the electronic transmitting device, then drove alone to petitioner's residence (R. II, 26-27, 56, 65). He parked his car, and petitioner came out of the house. Alexander told petitioner that the reason he took so long was that the purchaser wanted to test the stuff. Alexander gave petitioner the jacket containing $300, told him that the fellow was satisfied with the stuff, and said that if petitioner kept it that way the fellow would continue to do business with him. Petitioner said, "It will go the same way as any other time, just like it did today." Agent Lipshutz, who overheard this conversation on an electronic receiving device while seated in an automobile, also testified with respect thereto (R. II, 27, 65-67).

Petitioner testified on his own behalf that on three or more occasions prior to May 14, 1963, Alexander had asked him to procure narcotics, but he had refused (R. II, 72). Petitioner said that his source for

heroin was a man named "Skinny" (R. II, 80). According to petitioner, he did not know who put the heroin in the service station; his contact told him over the telephone where the heroin would be located and petitioner informed Alexander of this location (R. II, 81-83).

ARGUMENT

1. There was no error in receiving into evidence, without defense objection, agent Lipshutz's testimony as to two conversations overheard on the receiving device while he was seated in his automobile. The evidence was received in corroboration of the testimony of Alexander, who was a witness at the trial. The fact that the first conversation took place in petitioner's home, where Alexander was present at petitioner's invitation for the purpose of arranging a sale of narcotics,[1] did not prevent Alexander from testifying with respect thereto. There was thus no reason to exclude the corroborative evidence obtained by a device carried on Alexander's person with Alexander's consent. *Lopez* v. *United States*, 373 U.S. 427. There is no meaningful distinction between the minifon recording device involved in *Lopez* and the transmitter involved in this case, and no distinction has been drawn in the decisions. *United States* v. *Pasquinzo*, 334 F. 2d 74 (C.A. 6); *Maddox* v. *United States*, 337 F. 2d 234 (C.A. 5).

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[1] No arguable issue of privacy is involved in the second conversation which occurred at Alexander's car parked near petitioner's home.

2. Nor did the district court err by receiving in evidence, without defense objection, agent Sherman's testimony regarding the conversation he overheard between petitioner and Alexander in petitioner's home. The record does not support petitioner's claim that Sherman was a trespasser. After Alexander telephoned petitioner to say that the person he had been talking about did not want to surrender his money until he obtained the merchandise, petitioner told Alexander to "come on over." When Alexander appeared with Sherman, petitioner apparently believed that Alexander was purchasing heroin for Sherman. Consequently, Sherman was on petitioner's premises at least with petitioner's implied consent,[2] and petitioner made no order or demand that Sherman leave. Petitioner did not invite Sherman into his house, but he could have closed the door so that his conversation with Alexander might not be overheard. Instead petitioner left the door open, thereby enabling Sherman to overhear the discussion. In any event, since petitioner presumably anticipated that Sherman would go with Alexander to find the narcotics where they had been hidden, it is reasonable to assume that petitioner had no objection to Sherman's hearing the location at which the narcotics could be found.[3]

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[2] The court below, in observing that the record did not show that Sherman was a trespasser, stated that for all that appeared, Sherman may have been standing on a public sidewalk (Pet. App. 2).

[3] The situation here is unlike that in *People of State of California* v. *Hurst*, 325 F. 2d 891 (C.A. 9), and in *Brock* v. *United States*, 223 F. 2d 681 (C.A. 5), where the officers

3. Relying upon *Hamilton* v. *Alabama*, 368 U.S. 52, and *White* v. *Maryland*, 373 U.S. 59, petitioner claims that he had no counsel at arraignment (Pet. 15-20). The record shows, however, that when petitioner appeared before the court on August 12, 1963, for arraignment and plea without counsel, he merely stated his true name as set forth in the indictment, and the court ordered the case continued for plea (R. I, 5). Petitioner appeared on September 9, 1963, with counsel, and pleaded not guilty to both counts of the indictment (R. I, 6). The purpose of arraignment, as made clear by Rule 10, F.R. Crim. P., is to inform the accused as to the charges alleged and obtain a plea to the charges.[4] Petitioner was represented by counsel when this was done.

4. The statutory presumption of 21 U.S.C. 174 which petitioner attacks—*i.e.*, that unexplained proof of possession of narcotics supports a conviction for the concealment and sale of unlawfully imported narcotics—was upheld in *Yee Hem* v. *United States*, 268 U.S. 178, was sustained against a more limited challenge to its scope in *Roviaro* v. *United States*, 353 U.S. 53, 63, n. 14, and was assumed to be valid in

came on the accused's premises without his knowledge. In *Brock*, moreover, the officers induced self-incriminatory remarks in answer to suggestive questions addressed to an accused talking in his sleep.

[4] Rule 10, F.R.Crim.P., provides: "Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

Harris v. *United States*, 359 U.S. 19. This Court has repeatedly declined to reconsider its rulings with respect to the validity of that presumption. See *Agobian* v. *United States*, 323 F. 2d 693 (C.A. 9), certiorari denied, 375 U.S. 985; *White* v. *United States*, 315 F. 2d 113 (C.A. 9), certiorari denied, 375 U.S. 821. It has likewise declined to review decisions upholding the more recently created presumption of illegal importation of marihuana (21 U.S.C. 176a) as against a contention that the inference arising from possession is less rational in the case of marihuana than with respect to opium. *Caudillo* v. *United States*, 253 F. 2d 513 (C.A 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931; *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 361 U.S. 853. There is no reason now for reconsideration of this settled line of decisions.

5. Petitioner's final contention is that he was not shown to have had possession of the heroin so as to bring the presumption into play. Actual physical possession was not necessary, however, so long as there was circumstantial evidence to establish petitioner's dominion and control over the narcotics. *White* v. *United States*, 315 F. 2d 113, 115 (C.A. 9), certiorari denied, 375 U.S. 821; *Rodella* v. *United States*, 286 F. 2d 306, 310-313 (C.A. 9), certiorari denied, 365 U.S. 889; *United States* v. *Buonanna*, 290 F. 2d 585, 587 (C.A. 2); *United States* v. *Malfi*, 264 F. 2d 147, 150-151 (C.A. 3), certiorari denied, 361 U.S. 817. Petitioner told Alexander precisely where the heroin was hidden, and it was found there. These facts suffice to show petitioner's dominion and control over

the heroin, and the court was justified in concluding that he had constructive possession.

Petitioner argues that he merely facilitated or arranged the sale so that his case comes within decisions such as *United States* v. *Jones*, 308 F. 2d 26 (C.A. 2), and *Hernandez* v. *United States*, 300 F. 2d 114 (C.A. 9), where convictions were reversed on evidence that delivery of the narcotics was made not by the accused but by a third person. The trial court in this case, however, could choose not to believe petitioner's testimony, the substance of which was that his unknown contact, or someone acting on the contact's behalf, had placed the heroin in the wash basin. The court, as trier of the facts, could have concluded that the narcotics had been placed under the wash basin by petitioner or upon his instructions.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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Assistant Attorney General.

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